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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-590

D. B. ANDERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

J. GLENN HAHN
1100 Commerce Bank Building
Kansas City, Missouri 64106
Counsel for Petitioner

Of Counsel:
HARLOW B. KING
WALTER J. KENNEDY
1100 Commerce Bank Building
Kansas City, Missouri 64106

E. L. MERSERHALL, INC., 918 Cherry Street, Kansas City, Mo. 64106, 421-9050

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Petitioner prays that this Court grant rehearing of its order of December 11, 1972, denying the Petition for Writ of Certiorari, and requests that a writ of certiorari issue to review the judgment of the United States Court of Claims in the above-entitled case as prayed for in the petition filed herein by the petitioner on October 12, 1972.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

It would be patently unwise to permit the final interment of Section 337 of the Internal Revenue Code without one more endeavor to exhume at least the vital organs, one more attempt to ascertain the real cause of its saddening demise. Never mind about "property" or "sale". Never mind about *West Seattle National Bank* or *Alice Phelan Sullivan* or even, shades of excitement, *Corn Products*. Forget about the rules of burden of proof on motions for summary judgment; perhaps it is only natural that they be more often honored by their breach than by their observance. Forget about the stratagem of opposing counsel; let them toss in a brief from *Gould* v. *Gould*, or even *Brown* v. *Board of Education* if they like, why not? Cast all these things aside; they are but ephemera that pass in the night. The cold, hard, unescapable, present fact is that Section 337 is dead; the carefully conceived child of *Court Holding Company* and *Cumberland Public Service* has been taken from us. How did it die? Was it homicide?

Perhaps even the most meticulous autopsy will never reveal the real villain. Perhaps history will show that the *Anders*' decisions were based very simply on the needs for revenue; the courts simply lacked the refreshing candor to say as much. Perhaps such Machiavellian approach, as it were, seemed more "sophisticated", less prone to reversal on appeal. But I think not. I think that the off-

spring died the unwitting victim of an artful ruse. It gasped its dying breath in the tentacles of a "trap for the unwary", reconstituted by defendant in open defiance of the will of Congress.

No useful purpose would be served by reiterating here the clear and unmistakable words of the Committee Reports of the 83rd Congress, expressing its intent in enacting Section 337. Petitioner has repeated them before this Court[1] and others, to no avail. By simple judicial fiat they are not to be heard; Congress' intent is not to be what Congress itself said it was. How much more facile it is to ignore the statements of the Committee Reports entirely, to pull from the air some platitudinous statement to reflect what that court thinks the Congressional intent should have been,[2] or to ignore entirely any discussion of Congressional intent and rely upon the convenient dodge of precedent?[3] Is candor to have so little esteem, even in the highest court in the land?

However crippling it might be, this blithe disregard of the Congress' own words in expressing its intent would never have succeeded, but for the fact that defendant was aided and abetted in his ignoble deed by making the following representation to the court below:

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1. Petition for Writ of Certiorari, pp. 13-15.

2. "In these circumstances we do not believe that treatment as a non-recognizable gain was intended by Congress. . . ." *Commissioner* v. *Anders*, 414 F.2d 1283 at 1288-89 (10th Cir. 1969). Is the administration of the Internal Revenue Code to be determined merely by a court's *beliefs*?

3. *Spitalny* v. *United States*, 430 F.2d 195 (9th Cir. 1970); *Connery* v. *United States*, 460 F.2d 1130 (3rd Cir. 1972); the instant case below, 462 F.2d 1147.

"Contrary to plaintiff's assertion (Br. 18, 19), *Spitalny* and *Anders* do not contravene the purpose of Section 337. Section 337 was designed to eliminate the distinction between *Court Holding Co.*[2] situations and *Cumberland Pub. Serv. Co.*[3] situations. See Bittker and Eustice, *Federal Income of Corporations and Shareholders* (2d ed.), pp. 402, 404 (fn. 96). The application of the tax benefit rule here is not involved with that distinction; *in either situation (a sale by the corporation as in Court Holding, or a distribution to, and sale by, the shareholders as in Cumberland Pub. Serv.)*, we submit that *the tax benefit rule would apply to cause corporate recognition of the recovery of the previously deducted cost of the rental items here involved. Commissioner* v. *Anders, supra*, p. 1286; *Bishop* v. *United States*, 324 F.Supp. 1105, 1110-1111 (M.D. Ga., 1971)." (*Italics added*)[4]

2. 324 U.S. 331 (1945).
3. 338 U.S. 451 (1950).

The cases there cited, *Anders* and *Bishop*, do not in any way support such premise. Defendant's statement represents an active, calculated[5] misrepresentation of the applicable law on the sole substantive issue before the trial court. This misrepresentation alone justifies the granting of the writ of certiorari herein.

The opinion below casts no reference to this premise, but having held in favor of defendant, the court must not have disagreed with it. Therefore, it could well have been misled thereby. If defendant can establish that its statement indeed represents the applicable law, then it

4. Reply Brief for the United States, pp. 3-4. This same argument was advanced in oral argument before the court below.
5. The use of "we submit" should not be permitted to aid defendant's scheme.

has nothing with which to be concerned. If it cannot, then indeed it has every reason to oppose further the granting of this writ.

Time is fast running out. No court heretofore has been willing to look squarely at the language of the Committee Reports of the 83rd Congress and justify the conclusion that Congress intended to preserve the distinction between *Cumberland Public Service* and *Court Holding Company* in certain types of Section 337 liquidations or in any Section 337 liquidations. Nor has any court determined that the tax benefit rule would apply to cause the corporation to realize income on its final return, where distribution to the stockholder precedes the sale. This taxpayer, and indeed all taxpayers, are entitled to have this issue squarely met, free of any misleading representations by defendant.

CONCLUSION

For the reasons set forth above and in its petition for certiorari, it is respectfully requested that rehearing be granted, and that this Court address itself to the question here presented

Respectfully submitted,

J. GLENN HAHN
1100 Commerce Bank Building
Kansas City, Missouri 64106
Counsel for Petitioner

Of Counsel:
HARLOW B. KING
WALTER J. KENNEDY
1100 Commerce Bank Building
Kansas City, Missouri 64106

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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J. GLENN HAHN
1100 Commerce Bank Building
Kansas City, Missouri 64106